IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. JON KEVIN MORRIS, Defendant.	CRIMINAL NO. 01-00094HG
UNITED STATES OF AMERICA, Plaintiff, vs. (01) KIL SOO LEE, Defendant.	CRIMINAL NO. 01-00132SOM
UNITED STATES OF AMERICA, Plaintiff, vs. THOMAS MITCHELL SCHNEPPER, Defendant.	CRIMINAL NO. 02-00062ACK
UNITED STATES OF AMERICA, Plaintiff, vs. (02) DANIELLE ISHIMURA, Defendant.	CRIMINAL NO. 02-00273HG

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Thursday, December 18, 2003, at 10:10 a.m., at Honolulu, HI

BEFORE: THE HONORABLE HELEN GILLMOR
THE HONORABLE SUSAN OKI MOLLWAY
THE HONORABLE ALAN C. KAY
United States District Judges

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

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THURSDAY, DECEMBER 18, 2003 10:10 A.M.

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THE CLERK: Criminal Number 01-94, the United States of America versus Jon Kevin Morris.

Criminal Number 01-132, the United States of America versus Kill Soo Lee.

Criminal Number 02-62, the United States of America versus Thomas Mitchell Schnepper.

And, Criminal Number 02-273, the United States of America versus Danielle Ishimura.

These cases are called for hearing on motion to impose sentence without reference to the sentencing guidelines because the guidelines have been rendered unconstitutional by the Protect Act.

MR. ROTKEY: Good morning, Your Honor.

Michael Rotkey for the United States in all four cases.

JUDGE GILLMOR: Good morning. I see Mr. Nakamura is with us, as well.

MR. ROTKEY: Yes, he is.

MR. NAKAMURA: Good morning, Your Honor.

MR. WOLFF: Good morning.

Peter Wolff appearing on behalf of Jon Kevin Morris in 01-94. Your Honor, Mr. Morris is present, but he is in the audience.

JUDGE GILLMOR: Good morning.

MR. PARTINGTON: Good morning, Your Honor.

Earle Partington for defendant Kill Soo Lee, who is present in custody with the Korean interpreter.

JUDGE GILLMOR: Good morning.

THE INTERPRETER: Good morning.

MS. TOWER: Good morning, Your Honor.

Pamela O'Leary Tower standing in for Richard Kawana, on behalf of Thomas Schnepper, who is present with counsel.

JUDGE GILLMOR: Good morning.

JUDGE KAY: Well, on that point, I want to get Mr. Schnepper's agreement to have Ms. Tower represent you temporarily at this hearing.

DEFENDANT SCHNEPPER: Yes, Your Honor, I do agree.

JUDGE KAY: That's agreeable with you?

DEFENDANT SCHNEPPER: Yes, it is.

JUDGE KAY: All right, the court appoints Ms. Tower as temporary counsel for purposes of this hearing.

MS. TOWER: Thank you, Your Honor.

JUDGE GILLMOR: Could I ask you, Ms. Byrne, to take that microphone and pull it toward you, and pull it up.

Go ahead.

MS. BYRNE: Yes, Your Honor. Good morning.

Pamela Byrne is present for Danielle Ishimura. Her presence is waived; her child is ill today.

JUDGE GILLMOR: Very well, good morning.

Okay, before we begin -- the defendants may be seated but I want to check with counsel about timing. Now, I have a suggestion, and I would like to know whether or not it's agreeable, or, if you have a different suggestion, I would suggest that the government speak for 20 minutes, and the total of the defense be 30 minutes. And, if that's agreeable to counsel, then we'll check with the defendants.

Would you move that mike up, please.

MR. ROTKEY: Yes, I apologize, Your Honor.

We don't have any objection to the protocol, subject, of course, to -- if there is extensive questioning that may run over, we might ask the court to indulge us for a few more minutes, but we have no objection.

JUDGE GILLMOR: Certainly. And I would expect, if there is anything like that, you would ask for more, but I just want to set some ground rules.

Mr. Wolff?

MR. WOLFF: I think that's fine, Your Honor, although I don't actually anticipate having 30 minutes' worth of remarks. And the other --

JUDGE GILLMOR: Well, I am talking total.

MR. WOLFF: But the other counsel, basically, have told me they want to defer to my argument and don't anticipate that they would have much, if anything, to say. But if there

were questions, of course, that were pertinent to a particular defendant that weren't universal to all four, then I would ask that the court address those questions to the person that's likely to know about it.

JUDGE GILLMOR: Very well.

MR. PARTINGTON: That's correct, Your Honor.

JUDGE GILLMOR: Ms. Tower?

MS. TOWER: That's correct, Your Honor.

MS. BYRNE: Yes, Your Honor, we agree.

JUDGE GILLMOR: And the defendants are in agreement with this policy?

DEFENDANT SCHNEPPER: Yes.

JUDGE GILLMOR: Mr. Schnepper has said yes.

(Discussion off the record between Mr. Partington and defendant Lee, through the interpreter.)

JUDGE GILLMOR: And, Mr. Wolff, your client is in the audience?

MR. WOLFF: Yes, and he's acknowledged that that's fine with him.

JUDGE GILLMOR: Okay.

MR. WOLFF: Nonverbally.

JUDGE MOLLWAY: Mr. Lee, is that all right with you in terms of the schedule?

JUDGE GILLMOR: If the interpreter would rise and speak.

THE INTERPRETER: Yes, thank you.

JUDGE GILLMOR: Okay.

And I would ask that you use the lectern.

MR. ROTKEY: Yes.

JUDGE GILLMOR: Thank you.

(Discussion off the record between counsel.)

MR. ROTKEY: I will defer to you; it's your motion.

MR. WOLFF: All right.

Good morning.

The question that's presented in this case is whether there's really any limit to what Congress can do in setting sentencing policy, or in directing that sentencing policy for the country be handled by a commission. And it seems to me, and our argument is, that there is a limit, and the Congress has passed the limit with the enactment of the Protect Act.

Now, of course, a question similar to this question was decided in Mistretta when the guidelines were first enacted, and so I think we would have to acknowledge that, if this case -- or if the current situation after the Protect Act is undistinguishable from Mistretta, then we lose. But I think that, and our argument is, that the situation has really changed quite a bit since Mistretta was decided. And the Protect Act is what changed it. And so the question, then, for this court, is -- and for the judiciary as a whole -- is,

who will protect the judicial power, who will say that the Congress or the executive has gone too far, has encroached, has interfered, if the court itself won't? And the answer is, and the Protect Act demonstrates this, as well, that nobody will.

So, it's -- in a way, it could be viewed as -- although maybe this is making too much out of it -- sort of a "defining moment" in the history of the judicial power in this country, because if, as the government argues, the Congress can do anything, in terms of deferring questions of what's the proper policy for sentencing to a commission, as long as they do it in pieces, and as long as they don't threaten the judges who exercise the judicial power of the country, as individuals, with reduction of their compensation, or with impeachment, then it seems that the government's argument is that anything could be done. Because, if what's been done in the Protect Act could be done, there's no reason why the next act couldn't do some more, and the one after that couldn't do some more.

And, so, while I'm not really making a slippery slope argument, what I am saying is that -- is that, at some point, even with Mistretta being the law of the land, there has to come a point at which interference with the judicial power to render a judgment in a case has to be acknowledged as an interference.

And the particular vice that is presented by the scheme that the guidelines, post-Protect Act, deal with is that -- and the reason I am saying this is because there can't be any doubt that the Congress could enact mandatory sentences, at least no current doubt under the constitution. So, the question is, you have a guidelines commission which does something very similar: It sets minimum guidelines, it sets maximum guidelines, it tells courts what evidence they consider, what evidence they may not consider, what kind of things they can do, what kind of things they cannot do. And so what was seen in Mistretta as okay because it was just a fettering of previous existing judicial discretion at some point has to be taking away the judicial power to appoint where the court is no longer, in determining a sentence, rendering its judgment.

The notion of judicial power being exercised by the judges of the country, as individuals, is, I think, the proper view of what goes on in the judicial process. But when that is circumscribed, and how the court must consider something, and what it must consider, and what it may not consider is narrowed, there is an infringement on judicial power. And, particularly, what has happened here is that Congress, not wanting to do this itself, has deferred it to a commission. And the commission, I think, at this point, given the direction of the Protect Act, can only be properly

characterized as a legislative commission. And, as we know, a legislative commission, that is to say a commission that prescribes laws, conducts the investigation, tells what the policy's going to be, that's a problem. It's a problem because the constitution requires that Congress enact laws in a particular way, and in a particular procedural fashion, and they can't do something that is inconsistent with that.

And, so, really, what it comes down to, in terms of the way the guidelines have been changed, is that the very vice that Justice Scalia identified in his dissenting opinion in Mistretta, has come to pass; that the Congress has changed its mind about what happened with the guidelines in the years since they were enacted and has directed the commission to change the law in accordance with their general wishes. But they are not willing to enact the law, themselves.

And I think, also, there's some doubt about whether they could actually do it if they enacted it directly, because while we have a situation where it seems like you could say, well -- and they've done this -- Congress sets the maximum penalties, they set the minimum penalties; it's not at all clear to me that Congress, by enacting a law directly, could do what the commission has been directed to do. In other words, that Congress could tell a judge, or all the judges of the country, this evidence, this type of evidence, is irrelevant in sentencing. Or, this type of evidence is

irrelevant in sentencing in a particular category of cases. But yet that is what they've done.

The other thing that the Protect Act did is that it enacted a set of reporting requirements and changed various standards of review, and we suggest that that is also an interference with the judicial branch that ought to be recognized as a violation of the doctrine of separation of powers. And I think it's those provisions which are in force which aren't deferred, and as to which the legislature intends that they apply to all cases post-Protect Act that answer any questions that might exist about, well, how does the Protect Act affect your client if his offense -- my client -- if his offense took place before the Protect Act was passed, before the legislation became law. Those aspects of the Protect Act went into effect and are intended, by their language, to apply to all cases that would come before the court post April of this year, whenever the exact date was the legislation passed.

So, it's really the case that we confront here a question about whether there's any limit to what Congress can do. And there must be some limit; otherwise, there's no content to the notion of separation of powers, and it's for this court to say whether the limit has been breached. And I suggest that it has.

Now, I would be happy to answer questions, or maybe to save whatever time is available to answer Mr. Rotkey's

arguments when he makes them, but I think that we have set forth our arguments in our papers, and so, unless there are questions, I would be prepared to sit down for now.

JUDGE GILLMOR: Judge Kay? Or Judge Mollway?

JUDGE MOLLWAY: Not right now.

MR. WOLFF: All right.

JUDGE KAY: Well, I'll ask one question:

Justice Scalia did write a very strong dissent in Mistretta, but he was the loan dissenter.

MR. WOLFF: Yes.

JUDGE KAY: And, while Title IV imposes further constraints, and some might say onerous tasks on the judiciary, isn't it fair to say that these new constraints still fall within the confines of Mistretta? Or where would you say they fall outside?

MR. WOLFF: Well, I think they fall outside when you -- they fall outside for -- maybe for two reasons:

One is that, what we had when Mistretta was decided was a direction from the Congress to the commission to study the sentencing history and practice of the country and to formulate guidelines that were designed to create national uniformity, or at least to significantly reduce what was viewed as unwarranted disparity between similarly situated defendants.

And as I think we demonstrated in our reply

memorandum, it was anticipated by the Congress that there would be -- at least the Congress that drafted that legislation -- that there would be a significant number of departures. One that was consistent was the practice of the parole commission, the one that was consistent with the practice in Minnesota, which had a guideline system similar to what was envisioned for the United States.

Then, what we have with the Protect Act, and what's changed -- so what you had was an attempt -- we could debate whether it was successful or not -- but an attempt to apply national standards to the country as a whole, based on historical practices, and based upon the policy judgments made by the Sentencing Commission.

But with the Protect Act, we have something, I suggest, quite a bit different, because what the Protect Act directs the commission to do is to change things by significantly curtailing the number of departures, by going through a process that will result in far fewer departures, and that will result in no departures on certain grounds, in certain kinds of cases, and which direct the courts of the country to either refuse to consider certain types of evidence in certain kinds of cases, or to have to consider certain kinds of evidence in certain kinds of cases.

And one example would be the third point for acceptance of responsibility, which, up until recently, was a

judicial judgment about whether the defendant had done what the guidelines required in order to earn that point. Now the court has -- it's hard to tell whether the court has any role in the third point. The court can't award the third point unless the government moves for it.

JUDGE KAY: Well, as far as your client goes, won't the ex-post facto provision bar the application of --

MR. WOLFF: I think so. Although I think, if I am not mistaken in this case, and I know in other cases the government has gone forward and moved for the third point as though they weren't too sure about the ex-post facto issue -- or maybe they want to cover their bases, or whatever.

And so, to try to get back to the question, Congress has made a policy decision that there's been too many departures, and they want there to be less. And so they have directed the commission to change the sentencing policy of the United States. But I think that the vice in that is that they basically want the Sentencing Commission to legislate. And that's why we argue that this is a -- has become a legislative commission, and legislation has to be enacted in a particular way; it can't be enacted by a commission, no matter how convenient that it might be that it do so.

JUDGE MOLLWAY: But, following up on Judge Kay's comment, why do we have to go so far as to sentence without reference to the sentencing guidelines, as opposed to using

the pre-Protect Act law for clients whose cases were already ongoing at the time the Protect Act was passed? So the ex-post facto issue that Judge Kay mentioned, why do we have to go to the full extent that your motion seeks?

MR. WOLFF: Well, I think the reason is because it's important to draw a line to protect judicial --

JUDGE MOLLWAY: Right. But I guess this goes to standing. It may be that a case that's post-Protect Act would be the proper case in which to examine whether that line had been crossed, but with your client and those others who are here, since they were pre-Protect Act, this might be decided only on an ex-post facto basis, which would not invalidate the application of the guidelines, but only use the pre-Protect Act guidelines.

MR. WOLFF: Well, that would -- I mean, that would be an approach; but, the reporting requirements in the direction of the Department of Justice to report to the Congress the sentencing data, including the names of judges, and so forth --

JUDGE MOLLWAY: Even if we were to say that that was not appropriate, possibly that's also an ex-post facto issue, that, certainly, judges shouldn't have to have all this stuff reported on them on matters that were already in the pipeline, and which they were handling before the Protect Act even kicked in. I don't know, but that's a possible way to do it

and not go the full nine yards in this case, but reserve that issue for some post-Protect Act case.

MR. WOLFF: Right. And we have asked for that relief as an alternative, although, obviously, we would prefer the -- well, we would prefer any ruling that was in our favor, but the more expansive the better...

(Laughter in the court.)

MR. WOLFF: I'm sure that won't be news to the court.

(Laughter in the court.)

JUDGE KAY: Wouldn't it be fair to say that the imposition on the judiciary of Title IV is a much lesser imposition than the imposition of the guidelines which was approved by the Supreme Court.

MR. WOLFF: Well --

JUDGE KAY: Is this the straw that breaks the camel's back?

MR. WOLFF: Well, if it isn't the straw that breaks the camel's back then there'll be no straw ever that breaks the camel's back. In other words, if the government's argument is admitted here and prevails, then there's really no limit that I can see, no principal upon which some court in the future could say, well, now you've gone too far. Because, what would it be? I suppose if they passed -- if they directed the commission to single out by name a defendant, or

to identify post indictment but before sentencing a class of defendants and pass guidelines that apply to that defendant by name, you know, you could say, okay, we have gone too far. But, barring something like that, it's not clear to me that there would be anything -- if this is okay -- that would not be okay. Because, here, the Protect Act directs that certain kinds of information that had traditionally and under the guidelines been relevant to departures, like family ties and community service and those things, even though they might be discouraged departures, they were still available in extraordinary cases, those have been eliminated for a particular class of cases.

And what would stop the Congress from directing the commission next time to eliminate those considerations in another class of cases? And then a class after that? Or to tell the court that, if the defendant is going to have a departure, he must prove his evidence up by a standard beyond a reasonable doubt, but if the government wants an upward departure they can prove it by a preponderance of the evidence. Or anything like this. It doesn't seem to be there's any limiting principle that this is okay.

And I go back to what Mistretta did -- or what the guidelines did that Mistretta approved, which was to deal with what the Congress identified as a problem; namely, the disparate sentencing across the country. But now, having

accomplished that, and having ended up with a system that was -- at least as far as I'm concerned -- working in accordance with the original framers' intent, in terms of departures, they decided to change national sentencing policy, and to do it by indirect legislation through what we contend now is a legislative commission.

JUDGE KAY: Now promoted from the junior varsity to the varsity --

MR. WOLFF: It's a senior varsity commission because these troubling issues are hard to deal with. And it's easier to put it in front of a commission of people with no constituents, less well known, and there's no one then to blame. The individual congressman who votes to enact a particular guideline that causes harsh result in a particular case might get some feedback from one or more of the people who live in his or her district. But when you put it off to a commission, it's just another relatively more or less anonymous bureaucracy that is enacting the legislation. And I think that, because of what Article One says in the constitution, about how legislation has to be enacted, that's a problem.

JUDGE GILLMOR: Any other questions?

(No response.)

JUDGE GILLMOR: Thank you, Mr. Wolff.

Mr. Partington?

MR. PARTINGTON: No, I join in what Mr. Wolff had to say.

JUDGE GILLMOR: Ms. Tower?

MS. TOWER: I join in what Mr. Wolff had to say.

JUDGE GILLMOR: Ms. Byrne?

MS. BYRNE: Yes, we have nothing to add at this time; thank you.

JUDGE GILLMOR: Thank you.

The government, please.

MR. ROTKEY: Thank you, Your Honors, and, may it please the court, counsel, again, my name is Michael Rotkey. I am an attorney for the appellate section of the criminal division of the United States Department of Justice in Washington, D.C. I represent the United States in these four cases, in connection with these pending motions. And, at the outset, I want to thank the court for accommodating our request for this consolidated proceeding here this morning.

Your Honors, the defendants' motion in this case raised a number of issues and supposed concerns based upon the provisions of Title Four of the Protect Act.

In our brief in response, what we tried to do was to go through and analyze the specific statutory provisions that the defendants have cited, and to try to explain that notwithstanding their failure to acknowledge the legitimate purposes that are being served here, none of these provisions

transgresses any constitutional limitation imposed on the Congress or the executive branch.

Neither in their reply brief or again here this morning do we have any specific focus that is being made by the defendants on what is the statutory provision that allegedly violates the constitutional principle of judicial independence that is being invoked. We have a lot of broad discussion about junior varsity commissions and delegations, and we don't like these things, and Congress has exceeded the limits, but with all due respect, it's not enough to just make the conclusion, we have to look at what allegedly caused there to be this constitutional violation. What provision in the statute runs afoul of the constitution -- the constitutional principle that's at issue?

And what we have submitted, Your Honor, in our brief, after going through each particular provision of the statutes that the defendants have cited, is that none of them comes even close to transgressing the broad constitutional limit of judicial independence on Article Three judicial independence. And, therefore, we think that Congress acted well within its authority in adopting the reforms that it did here, and that there is no basis upon which to declare -- for the extraordinary act of declaring a federal statute unconstitutional.

Now, what I would like to do in the time that's been

allotted is to just discuss some of the particular provisions at issue. And before that, I would like to just begin with a kind of brief overview here.

Prior to 1984, Your Honors, federal judges enjoyed virtually unfettered discretion at sentencing; however, predictably, the exercise of such broad discretion led to wide disparity in the sentences that were imposed on similarly situated offenders. And in the landmark Sentencing Reform Act of 1984, Congress sought to minimize, if not eliminate, these disparities and to achieve certain goals. And those goals were to bring consistency, fairness and predictability to federal sentencing practices. And that was the objectives that Congress sought to achieve.

To bring about those objectives, the Sentencing Reform Act of 1984 created a multi-member independent agency within the judicial branch, known as the United States Sentencing Commission, and directed the commission to promulgate what are known as the sentencing guidelines.

And, as the court well knows, Congress directed that those guidelines establish presumptive sentencing ranges based on offense and offender-specific characteristics. But yet it reserved to the court the power to depart from those ranges in truly exceptional or extraordinary cases.

Now, despite Congress' efforts and intentions, Your Honors, inequity still persisted under the new guidelines

regime, this time owing in large part to the excessive reliance on the number of departures that were being imposed.

And, so, earlier this year, just as it had in 1984, the Congress adopted legislation designed to address this seemingly intractable problem of unwanted sentencing disparity. And the question is whether, in adopting the provisions of Title Four of the Protect Act, Congress transgressed the constitutional principle by impermissibly interfering with the independence of the federal judiciary.

In our view, Your Honor, the answer is, no. And what I would like to now do is turn to a discussion of certain of the statutes, or the provisions that have been referenced here this morning. But, before I do so, I think it's important to just point out the general background principles that I think should inform and guide this court as it considers these questions.

And the first principle, Your Honor, is that statutes are presumed to be constitutional. That, due respect for our elected representatives requires that we begin from the promise that these statutes are legitimate exercises of authority.

And the second principle, which is related, Your Honor, is that courts have a duty to construe statutes in a manner that preserves and uphold their constitutionality. And I say this, Your Honor, because, in our view, the

defendants have fundamentally turned those principles on their head. Because they begin from the starting point that this is some kind of mean-spirited legislation that was designed, in their words, Your Honors, to threaten and intimidate the federal judiciary in the performance of their official duties.

We think that's not the case and that's not the appropriate starting point. And as we pointed out in our brief, we believe that each of the provisions of the statute cited by the defendants can -- does serve a number of legitimate justifications. It's not designed to intimidate the judiciary, and we shouldn't start from that premise.

I guess the main provision that I would like to focus on, which was discussed which Mr. Wolff, is the so-called reporting requirements. These provisions are found in Section 401(L) of the Protect Act and the Attorney General's memorandum from July of this year, which implements that provision.

Now, as a prefatory note, Your Honor, much has been written and much has been said about the Protect Act in the press and elsewhere. And the pleadings submitted by the defendants make reference to a number of news articles that discuss both the Protect Act in general, but also these particular reporting requirements.

With all due respect, Your Honors, the government's position is that there are a number of misconceptions and

inaccuracies that have been engendered about the purpose, effect and operation of these provisions. And what I would like to try to do in some of the time that's been given to me this morning is to try to clear the air about some of these misconceptions, and to use the colloquial, to set the record straight.

Your Honors, the United States Attorney's manual, which is an internal executive branch policy guide book, has long imposed upon federal prosecutors the duty -- federal prosecutors throughout the country, be it in the U.S. Attorney's Office in Hawaii or Alaska or Florida, it has long imposed upon those offices a duty to report -- and that is simply another word for "notify" -- the Department of Justice in Washington, D.C., where I work, and particularly in the appellate section of the criminal division, of all adverse decisions that are rendered, that are contrary to the government's position. And that can be a motion to suppress that is granted; it can be the granting of a judgment of acquittal. Whatever the issue is, there has long been a requirement to notify, report, those facts to the Department of Justice.

And those reporting obligations -- (incomprehensible) in the U.S. Attorney's manual, flow from the fact that the government occupies a very unique status, because, unlike a particular judge or a particular defendant,

the government is a party to every federal criminal proceeding. And, as a result of that unique status, Your Honor, there are certain obligations that are imposed on the government, and certain restrictions that are imposed on the government.

And what these reporting or notification requirements do is, they further legitimate institutional interests that are unique, or particular, to the executive branch.

The first interest that is served is, it makes sure that the government is taking consistent litigating positions throughout the country. We don't want federal prosecutors in Hawaii to take a position on the interpretation of a statute --

JUDGE GILLMOR: Could you slow down a little bit. The court reporter has to write this down, and you are gathering steam here...

MR. ROTKEY: I apologize. I actually warned the court reporter that my New Yorker in me -- sometimes I get ahead. I apologize.

The -- I'm sorry, Your Honor, I lost my train of thought... it serves a number of important interests. The first is to ensure consistency of litigating positions. But the second point, which I think is perhaps most important, is that it serves to keep the solicitor general of the United

States apprised as to trends and developments and interpretations of the law throughout the United States. And the reason that is significant, Your Honors, is that, by regulation, the solicitor general is the Attorney General's designee, who is in charge of supervising and managing all appellate litigation throughout the United States.

A federal prosecutor, be it in Hawaii, Florida, or elsewhere, has no authority, or no ability to appeal an adverse ruling that he disagrees with, on his own. It is only when the solicitor general gives explicit written authorization that such an appeal may be taken. And that is designed to centralize the process, Your Honors.

Now, why do I say all -- well, let me make one other remark here, and that is, adverse decisions, such as motions to suppress, are one thing, but under the pre-Protect Act version of the United States Attorney's manual, sentencing guidelines decisions did not need to be reported -- or notified to the Department of Justice. And the reason for that, Your Honors, is simply a practical one: We would be inundated with paperwork if we were required to be notified every time a court granted one point or didn't grant one point that we thought, in terms of calculating the offense level.

It was only if the prosecutor wanted to appeal that decision under the guidelines that notice was required, because, again, the solicitor general would need to approve

that request.

With regard to adverse departure decisions, I can say and represent that federal prosecutors rarely sought authorization to appeal those kinds of decisions. And that was largely due to the Coon decision, which imposed a highly deferential abuse of discretion standard. And, as a result, it was very difficult to prove reversible error in connection with the departure.

Now, what the Protect Act does, Your Honor -- and I apologize for the length of the background, but I think it's important -- what the Protect Act does is, it seeks to impose, in Section 401(l) more vigorous notification requirements concerning adverse departure decisions; that is, downward departures. And what the Attorney General has done, pursuant to the statutory authority, is to adopt objective criteria which now -- under which now federal prosecutors, if those criteria are satisfied, they have an affirmative duty to notify the Department of Justice as to that adverse ruling. It does not guarantee that an appeal will be taken. And it certainly does not, contrary to the analogy that's been suggested by the defendants, it certainly does not give the Attorney General the power to veto a sentence; it doesn't give the Attorney General the power to revise a sentence. This is pure and simply an intraexecutive branch notification requirement designed to enable the solicitor general to make

informed decisions.

And, so, the first point that I wanted to make, Your Honors, is that it really is, with all due respect, it's a misconception to view or to treat these reporting or notification requirements as some new directive by the Attorney General, and certainly to view it as a tool of intimidation. That is not the point. And, again, consistent with my earlier remarks, we should not be so quick to presume that to be the case. These provisions serve legitimate institutional interests of the executive branch.

And the second point, and perhaps what is most salient to our discussion here today, is that nothing, nothing in the statute or the attorney general's memorandum, in any way gives the executive branch or the Congress any impermissible coercive control or influence over the decisions made by life-tenured and salary-protected Article Three judges in connection with sentencing.

As I said before, the executive, by virtue of these reporting changes, has no power to revise a sentence or to conduct review of a sentence. At most, these provisions are designed to encourage the executive to seek judicial review of a sentence that it disagrees with. And so any veto of a sentencing departure decision comes from within the Article Three hierarchy. It doesn't give the executive the power to decree the sentence.

And, similarly, the suggestion that Congress somehow has the power to intimidate judges, or to decree what a sentence should be, there's nothing in the statute that supports such a construction. And, again, the whole idea behind the framers' vision, behind the genius of their vision, the whole reason that Your Honors have been endowed with life tenure and salary protection, is precisely so that you would be immunized from political pressures at the hands of Congress. In short, there is nothing that Congress can do against an individual Article Three judge because it may disagree with your decision, whether it's to depart or otherwise. There's no action that can be taken. That's why you have life tenure.

Theoretically, yes, the constitution does permit for impeachment of a federal judge, Your Honors, but, as we pointed out, that power cannot be exercised to retaliate against a judge for his or her official acts in office. Yes, it can be exercised if a judge evades his taxes or accepts a bribe, because those are unrelated to the exercise of judicial power, but there's no action that can be taken simply because Congress thinks that a judge is departing in ways with which it disagrees as a matter of policy. That's the way the system works. If Congress doesn't like it, the way to resolve it is exactly what Congress did here, in Title Four: It's through the legislative process. And that's what Congress did. But

the suggestion that there's some -- these reporting requirements are kind of mean spirited, or that they somehow transgress judicial independence -- and there's no support for that. There's none --

JUDGE KAY: Well, one point that has been raised is that it might discourage and intimidate younger judges in their decisions if they have aspirations of being elevated to a higher court and have to be approved by the Senate judiciary committee.

MR. ROTKEY: Well, Your Honor, with all due respect, that's kind of a hypothetical scenario. Is it a real one? I guess... maybe -- but that, to me, seems so far removed and so attenuated that, I mean, to think about it, to say that because of the possibility that an Article Three judge may have aspirations to be appointed to the court of Appeals, I mean, the Senate judiciary committee is going to scrutinize decisions independent of whether or not the executive decides to appeal them or not.

It seems to me -- I would certainly defer to Your Honors about the workings of the Senate judiciary committee process, but it seems to me that decisions are going to come under a microscope regardless, and that whether or not the executive chooses to appeal that decision -- there's no way to know. And there's no way to say that that's kind of the causal factor, or that there's going to be some

intimidation, or that judges should refrain from exercising their judicial power because of this potential consideration that may or may not ever manifest itself.

Again, I have to defer to Your Honors about the judicial -- about the confirmation process, but -- a similar issue was dealt with in Mistretta, and the Supreme Court found no constitutional infirmity there. I'm not quite recalling exactly what it was, but I know that there was a specific discussion about judges perhaps wanting to curry favor with the president in order to secure a nomination to the Sentencing Commission.

And similar arguments were raised and rejected in Mistretta, and I would just cite that as support.

But, again, what it ultimately comes back to is that regardless of aspirations, Your Honor, you have life tenure, you have salary protection, and there are very good fundamental, sound reasons that the framers gave you those protections. And that is so that you would be insulated from political pressures, in terms of being threatened or intimidated. And that would be our position as to that point, Your Honors.

I don't know if the court -- again, my main focus here was to try to address these reporting requirements and show that there's really nothing sinister about them; that they are really part of a long-standing executive branch

practice.

I guess the one other observation I would just make concerning those requirements, Your Honors, is that I think there's an irony here, and the irony would be, what we are dealing with is whether Congress somehow violated the separation of powers. And yet I think for the court, with all due respect, for the court to say that the executive branch's own internal decision-making process about what kinds of decisions should and should be (sic) reported to the Justice Department -- not appealed, just notified or reported -- for a court to say that the executive may not make decisions about which kinds of cases, what kinds of criteria should gauge the reporting, I think that, in and of itself, would raise interesting separation of powers problems. I think that that get to a more fundamental question about whether the judiciary can tell the executive how to structure its own affairs.

It's not a question that's presented, but I think it's something to keep in mind. And I noticed it -- as I was thinking about the case -- that there is kind of an irony there. Because these are internal -- internal executive branch notification provisions. And I think the executive is entitled to make those kind of judgments to enable the solicitor general to make informed decisions about what kinds of cases merit an appeal.

I am fully prepared here this morning to address any

of the other statutory provisions that the defendants have cited in their brief, and I would be happy to answer any questions. I don't know if I have exceeded my time, but I would defer to the court in terms of how it would like me to proceed at this juncture. I have come a long way, and I am happy to spend my time as would best be suited.

JUDGE MOLLWAY: Let me ask about the government's position on the ex-post facto issue.

MR. ROTKEY: Uh-huh?

JUDGE MOLLWAY: In your brief, you suggest that the defendants really are worried about nothing because --

MR. ROTKEY: I think -- if I recall, Your Honor -- not to interrupt you, I apologize --

JUDGE MOLLWAY: Go ahead.

MR. ROTKEY: A lot of what we heard -- and I appreciate Your Honor's question -- a lot of what we heard this morning is, if this practice is upheld, then what's next? And then what's next after that? And, again, with all due respect, we have to focus on what's before us today, not hypothetical questions about what might happen in the future if Congress decided to do other things.

And, with regard to the ex-post facto provisions, Your Honor, there may well be -- that was raised, as Your Honor, Judge Mollway, noted, in connection with some standing arguments that we have advanced about why certain of

the claims are not really properly before the court at this time. And, in particular, the defendants have challenged Sections 401(a) and (b), which curtailed the district court's discretion to depart on certain grounds. It doesn't eliminate your discretion to depart, it just curtails it on certain grounds in the approximately two percent of cases that involve child abuse or sex offense crimes.

And the defendants have raised a constitutional challenge to this curtailment of discretion. And one of the arguments that we have made, Your Honors, is that there really is no standing to consider these claims. And there is an ex-post facto reason here:

First of all, three of the four defendants now before the court in these consolidated cases have been convicted of crimes other than child abuse or sex offense. The only defendant who has been convicted of a qualifying predicate is Mr. Schnepper. But yet, as to him, Your Honor, the ex-post facto clause would probably -- and my understanding is, the government's position has not been represented in writing formally -- it will be -- that there is an ex-post facto clause limitation, and that these -- the curtailment of these departure grounds, as applied to Mr. Schnepper, can't be reconciled with the ex-post facto clause. And, so, as a result, the question of whether these provisions are generally unconstitutional, it's not posed,

because none of these defendants has standing to argue about them; none is aggrieved by these particular provisions.

JUDGE MOLLWAY: But some of the provisions, the government's position is, do apply --

MR. ROTKEY: Yes.

JUDGE MOLLWAY: -- to all cases, including cases in the pipeline pre-Protect Act. And one of those is the reporting requirement.

MR. ROTKEY: Yes, that's correct. And that has long existed. The reporting requirement has long been on the books; this is just a modification. Effectively -- and one other point I meant to make about the reporting requirements: All it really does is, it takes a certain class of cases for which notice had been discretionary. It had been up to the U.S. Attorney whether they wanted to appeal. And it now makes it mandatory. That's the twist. That's the novelty of these reporting requirements. But the notion of the reporting requirements themselves are new is not correct. The Protect Act preserves and perpetuates but amends those reporting requirements in furtherance of the objectives of Title Four.

And the reason that we believe that the majority of these provisions should be applied is because that's what the Supreme Court tells us, is that we ordinarily apply the law in effect on the date of a crime. Now, there may be ex-post facto constraints, but I don't believe that the defendants

generally have argued that there would be some ex-post facto problem in -- for example, the provisions -- I am trying to think... there are provisions regarding the documents that the court is obliged to provide to the Sentencing Commission. I don't see where there's an ex-post facto problem there. The defendants have challenged the written statement of reasons that a court must give now when it departs -- on a prospective basis. I don't see where there's any application to these defendants or any ex-post facto problem there.

There may be a connection with the standing argument in the application of specific changes that are made, if they are disadvantageous, in cases that were already in the pipeline, but I don't think, more generally, there's any -- I think we do apply the law in effect at the time. And the Protect Act is the law that is in effect now and should be applied.

JUDGE GILLMOR: Did you have a question, Judge Kay?

JUDGE KAY: No, actually, I was going to ask a question on the ex-post facto.

JUDGE GILLMOR: I would like you to answer the issue raised by Mr. Wolff, that Congress couldn't do directly what they are trying to do indirectly, and that is, restrict the court from considering certain types of evidence at sentencing.

MR. ROTKEY: I would be happy to, Your Honor.

I must say that I am taken a little bit aback; I didn't read any of the defendants' briefs to kind of raise an argument about evidence that can be considered at sentencing. I may be mistaken, but -- let me just say, generally, I think the best response about Congress not being able to do directly... it seems to me -- and Mistretta makes very clear -- that Congress has the power to control the scope of judicial discretion at sentencing. And I think the Supreme Court has repeatedly said that if Congress wanted to, Congress could adopt strict determinant sentencing under which judges would have zero discretion -- no discretion. Congress could say, if you are convicted of armed bank robbery, you get 15 years in prison; that's it. And so it seems to me, if Congress can -- and that has been long upheld and repeatedly upheld as a constitutional exercise of Congress' authority. And I cite the Chapman decision of the Supreme Court, from 1991, which is in our brief, which is the most recent exposition of that principle.

And, so, if we can have strict determinant sentencing, if Congress could have done so, it seems to me there's lots of flexibility, there's lots of room for Congress to have done directly here what it's asked the Sentencing Commission to do. And I think, far from believing that Congress was trying to duck the issue, I think Congress wanted to benefit from the commission's expertise. That's why

Congress asked the commission to get involved here, was because the commission is the expert. The commission does have almost 16 years now of accumulated wisdom over how the guidelines are to be implemented. And so I don't see anything impermissible. I don't think Congress is trying to get around anything.

And to the extent that this is being -- the two broad issues in Mistretta, Your Honor, the two broad constitutional challenges were a delegation challenge and a separation of powers challenge. And the defendants have focused here today, in their papers at least, on the separation of powers issue. And to the extent now we are talking about, well, this has really now become a delegation issue, that Congress can't delegate this to the commission, first of all, again, I don't believe that a delegation challenge has been raised in the papers; but, again, for the reasons that I have stated, I think this is fully consistent with what Congress can and could not do.

We may disagree about the wisdom of Congress asking the commission to get involved here, but that's not -- with all due respect, that's not a matter for judicial cognizance. All we are concerned about here is the Article Three limitations. We are not talking about the wisdom of these policy decisions.

Who knows what Congress was doing and why they asked

the commission to get involved? I believe it's because of their expertise, but, again, I don't see how that factors into the constitutional analysis. And that's what we are here to focus on, is whether there's been some transgression of the Article Three's limitations.

Unless there are further questions...

JUDGE GILLMOR: I have a question.

MR. ROTKEY: Yes?

JUDGE GILLMOR: How do you see the judge's role with respect to the one point that Mr. Wolff mentioned?

MR. ROTKEY: A couple of things, Your Honor.

Again, I hate to be redundant here, but I don't believe that any of these defendants is affected by the three-point provision, so I'm not sure why it's being raised. I don't think any of these defendants -- I may be mistaken, but I don't believe that that's an issue.

But, in any event, the notion on the third point, at most -- again, that would be an ex-post facto consideration -- all that would mean is that there's some problem, that if it's going to be disadvantageous, we don't apply it to an individual defendant.

JUDGE GILLMOR: Well, I am asking you how you apply it, if it did apply.

MR. ROTKEY: Well, the provision says that, now, the third point may not be granted without a government motion.

And that is very similar to the procedure that Congress and the commission used in connection with 5(k) motions for substantial assistance, that the court has no power to grant a 5(k) departure unless the government first moves for one. And I think that's exactly -- I think Congress probably used that as a template in connection with the third point. But I don't see where that violates --

JUDGE GILLMOR: So does the court have any role deciding whether or not the one point is appropriate or not?

MR. ROTKEY: I think -- I haven't focused on this, Your Honor, but I would think, by analogy to the 5(k), that it absolutely does. There is an antecedent issue, which is whether the government has moved for the third point. I think if the government doesn't move -- again, drawing on the 5(k) and the Supreme Court's decision in Wade, we normally don't scrutinize the prosecutor's motives for not filing a motion for a 5(k) departure unless there is some unconstitutional motive.

So I think you view it as, number one, if the government doesn't move, and there's no unconstitutional motive, then I think that's the end of the matter. And if the government does move, then I think it's up to the court to make a judicial determination whether or not that one point is appropriate based on the timing of the plea, which I believe is one of the considerations. But, again, the mechanics about

how we implement the third point, I think -- to say that there may be some provision, some issue about how it's implemented -- I mean, what we are talking about here, let's make no mistake about it, the defendants have asked this court for the most extraordinary relief that a federal court is empowered to give, and that is a declaration of unconstitutionality. And so -- there's a wide gap between saying there may be a problem with the implementation or the mechanics of how you implement one provision and conducting that awesome act of declaring a federal statute unconstitutional across the board. And that's the relief that they have sought. And I think they have come well short of overcoming all the presumptions and all the burdens that they have to deal with to demonstrate how and why there is some requirement -- or some obligation on the part of this court to exercise that awesome authority.

And, so, because of those shortcomings, because of the presumptions, and because we think that Title Four is perfectly consistent with Congress' authority, as recognized by the Supreme Court, we ask the court to deny the defendants' motion.

JUDGE GILLMOR: Thank you, Mr. Rotkey.

MR. ROTKEY: Thank you, Your Honors.

JUDGE GILLMOR: Mr. Wolff, did you wish to reply?

MR. WOLFF: Briefly, Your Honor.

Let me focus first, briefly, on the subsection L that Mr. Rotkey referred to. That's the so-called reporting requirement. And while it is true that the Department of Justice had a reporting requirement before the Protect Act, the latest reporting requirement is a direct response to the Protect Act. And I thought it was somewhat ironic that the government's argument here is that the judiciary can't tell the executive branch, basically, anything about how to structure its internal policies, and yet their internal policies are a direct response to the congressional mandate set forth in Subsection L. So apparently they are quite content to have the Congress do so, and -- all I can say is that we are not so content.

That illustrates one of the problems here.

And I think the government's argument comes down to this -- and they have almost said it, but they haven't quite said it: There really is nothing that couldn't be done by some other Congress, in terms of directing the Sentencing Commission to do one thing or another, and -- and that's their position.

And while it is probably the case that Congress could directly legislate a system of mandatory sentences, when Congress legislates, they are constrained by the exhaustive, finely wrought procedures -- I'm quoting here -- that are set forth in Article One about how legislation is to be enacted.

And it doesn't say that you can do that by deferring to a commission -- which has now -- whatever it was at the time of Mistretta, it's now taken on, I would submit, the unmistakable characteristic of a legislative commission.

And this, perhaps, is an analogy that illustrates it: If Congress had taken this exact statute and said, instead of deferring to the Sentencing Commission, we're going to defer this to a subcommittee of the judiciary committee, who have great expertise in these matters, and they will write out these guidelines, and they will respond to the directions of the Protect Act, there wouldn't be any doubt, whatsoever, that that was unconstitutional, because the Congress cannot delegate to a subcommittee of itself its legislative power.

Here, we submit that -- and as I conceded at the beginning, if this case is indistinguishable now from Mistretta, if the situation now, post-Protect Act, is the same as existed when Mistretta was decided, we lose. But I don't think that's the case. We have an incremental but radical shift in what was going on in 1984, and unless it is curbed when it happens, unless it is recognized for what it is when it happens, there won't be any principal basis on which to say, at some future time, now you have gone too far.

So to respond to -- I forget which member of the court it was who talked about the straw that breaks the camel's back. At some point you have to say, if we don't stop

an encroachment upon one branch's power by another at a particular point, then we won't have a neutral principle which can guide us at some future date as to what the limit would be.

And it's not like pornography, where you recognize it when you see it, in the words of one of the justices from the past; you have to look at institutionally how this whole system works and then make a determination as to whether, institutionally, the Congress has begun to interfere in an unconstitutional way with the power of the judiciary. And we submit that they have done so.

And, while it is true that it would be an unusual -- I don't know about "extraordinary" -- thing to so hold, somebody has to do it. And that's why I started off saying that it's possible -- I hope I am right about this -- that this is one of those things that, when looked back on from some years down the road, was a defining moment, and did we see as a society what had happened to the judicial power when the Protect Act was enacted? And did we recognize it and do anything about it? Or did we just let it go by and say, we will take it up at a future date and hope that it all works out?

Well, I think you know my answer.

Thank you.

JUDGE GILLMOR: Thank you, Mr. Wolff.

Do any of the other defense counsel wish to speak?

MR. PARTINGTON: No, Your Honor.

MS. TOWER: No, Your Honor.

MS. BYRNE: It's tempting, but, no, Your Honor.

JUDGE GILLMOR: Thank you.

Then, if there is nothing further before the court, at this time we will take the matter under submission. And, thank you.

We stand in recess.

THE BAILIFF: All rise.

Court stands in recess.

(The hearing in the above-entitled cause was concluded at 11:11 a.m.)

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I, Stephen B. Platt, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings before the Honorable Helen Gillmor, United States District Judge.

/s/ Stephen B. Platt

MONDAY, APRIL 12, 2004 STEPHEN B. PLATT, CSR NO. 248